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Supreme Court, U.S.
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No. 95-550

In The

Supreme Court of the United States

October Term, 1995

PRINCE GEORGE'S COUNTY, MARYLAND,

Petitioner,

vs.

11126 BALTIMORE BOULEVARD, INC. (t/a Warwick Books),

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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26 pp

QUESTIONS PRESENTED[1]

1. Does the First Amendment require that a county zoning ordinance that regulates adult bookstores provide for "prompt judicial review", and if so does it require prompt access to the Courts or prompt completion of review by the courts?

2. Does the First Amendment require that a county zoning ordinance that regulates adult bookstores provide specific and reasonable time limits on the administrative process, and if so, is five months unreasonably long to decide whether to grant a zoning approval of unlimited duration?

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[1]11126 Baltimore Boulevard, Inc. T/A Warwick Books has no parent, subsidiary or affiliated companies or corporations.

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STATEMENT OF THE CASE

In 11126 Baltimore Boulevard v.

Prince George's County, 684 F.Supp. 884

(D.Md. 1988),[2] rev'd 886 F.2d 1415 (4th Cir. 1989), vacated and remanded, 496 U.S. 901, 110 S.Ct. 2580 (1990), appeal dismissed as moot, 924 F.2d 557 (1991), cert. denied, 502 U.S. 819 (1991), this Court ordered that the judgment of the Court of Appeals be vacated and remanded for further consideration in light of FW/PBS, Inc., TBA Paris Adult Book Store II v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990)(adult bookstore licensing schemes contain adequate procedural safe-guards when (1) any prior restraint before judicial review imposed by licensing process is for a specified brief period in which the status quo is maintained; and (2) there is a prompt judicial review after denial of a

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[2] The designation APX refers to the pages of the Appendix.

license). On remand, however, the Court of Appeals did not reassess the County ordinance with the analysis mandated by FW/PBS but dismissed the appeal and remanded with instructions to the District Court to dismiss the action, after the Court learned at oral argument that the County had changed its ordinance. Respondent then filed this action requesting the Court to grant relief against the Prince George's County Adult Bookstore Zoning Law, as amended. The Court of Appeals found en banc that a final administrative decision on an application would take a minimum 150 days and that judicial review would take at least another 103 days; and, therefore, the licensing scheme did not satisfy the standard imposed by the First Amendment. (Apx. 15a, 21a-22a). The Court held that

the eight month delay from the time of application for a license until judicial review was completed was not the brief specified period of administrative delay followed by prompt judicial review that is necessary to guard against the abridgement of protected speech. (Apx. 22a).

REASONS FOR DENYING THE WRIT

1. **THE COURT HAS DENIED THIS TERM A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT ON THE SAME ISSUE.**

The Court has already denied the Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit in No. 95-203 on the issue of:

> Whether "prompt judicial review" of administrative licensing decisions for First Amendment activities, and particularly for licensing decisions pursuant to Memphis' adult business licensing ordinance, is satisfied by providing access to a state court appeal within a specified time (as the First, Fifth, and Seventh Circuit ruled), or must the actual adjudication be completed within a specified time (as ruled by the

Fourth and Sixth Circuits).

See City of Memphis v. East Brooks Books, Inc., 48 F.3d 22, 224-25 (6th Cir. 1995)(a three to five month wait for administrative hearing did not meet this court's mandate for prompt judicial review).

2. THE FOURTH CIRCUIT'S OPINION IS IN HARMONY WITH THE DECISIONS OF THIS COURT.

The Fourth Circuit, following the principles enunciated in Freedman v. Maryland, 380 U.S. 51 (1965) and in FW/PBS, concluded what at minimum would be an eighth month delay from the time of application for the license until judicial review of any denial, was not a sufficiently brief period of administrative delay following by prompt judicial review that is necessary to guard against the abridgement of protected

speech. (Apx. 15A, 21A-22A). Kingsley Books, Inc. v. Brown, 357 U.S. 436 (1957)(by contrast to the Maryland Procedure in Freedman that failed to pass constitutional mustard, a New York statute intended to prevent the sale of obscene books in requiring a trial one day after joinder of the issues and resolution within two days after the trial, was constitutional); United States v. Thirty-Seven Photos, 402 U.S. 363, 374 (1971) (reasonableness of the time period during which a restraint on speech may operate prior to judicial review "may vary in different contexts"; a Federal statute imposing a prior restraint to require that judicial review be sought within 14 days and concluding that delays between 40 days and 6 months could not be sanctioned).

The judgment of the Fourth Circuit

was consistent with Freedman, 380 U.S., at 55, 59-60 (four months initial judicial review followed by six months on appeal, not prompt judicial review); Teitel Films Corp. v. Cusak, 390 U.S. 139 (1968) (invalidating Chicago motion picture censor ordinance providing for 50-57 day limit to complete administrative process); Southeastern Promotions Limited v. Conrad, 420 U.S. 456, 560-61 (1975)(judicial review 5 months later); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 690 n.22 (1968)(holding prompt judicial review was assured by provisions requiring a judicial determination within 9 days of the decision of the administrative body); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (noting that prior restraint on speech "tolerated...only where it...assured an

almost immediate judicial determination of the validity of the restraint").

Petitioner states the Fourth Circuit decision is inconsistent with Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) and Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). Neither of these cases involved special application procedures and subjective assessments. The ordinances in Young and Renton were specific proscriptions of property use and regulated only distance, an objective quantum. The Fourth Circuit found the ordinance here required additional analysis to assess its constitutionality because it was different from the ordinance considered in Renton, which did not impose "prior restraint". (Apx. 9a).

The Fourth Circuit's decision is

clearly consistent with this Court's prior restraint analysis. The Court in FW/PBS addressed the two constitutional evils associated with prior restraints:

> While "[p]rior restraints are not unconstitutional per se... [a]ny system of prior restraint. ..comes to this Court bearing a heavy presumption against its constitutional validity." Our cases addressing prior restraints have identified two evils that will not be tolerated in such schemes. First, a scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. 'It is settled by a long line of recent decisions of this Court that an ordinance which...makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official -- is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.'"
>
> Second, a prior restraint that fails to place limits on

> the time within which the decision maker must issue the license is impermissible.... Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license.... [T]his Court [has] held that a licensing scheme failing to provide for definite limitations on the time within which the licensor must issue the license was constitutionally unsound, because the "delay compel[led] the speaker's silence." Id., 493 U.S., at 225-226. (Citations omitted, emphasis added).

The Court then went on to conclude that the Dallas ordinance provided "no means by which an applicant may ensure that the business is inspected within the 30-day time period within which the license is purportedly to be issued if approved" or obtain prompt judicial review. Id., 493 U.S., at 227.

3. THERE IS NO IMPORTANT QUESTION RAISED REQUIRING REVIEW OF ANY ALLEGED CONFLICT BETWEEN THE CIRCUITS.

The district court in this case, Warwick II, observed that under FW/PBS "a licensing scheme directed at adult businesses (1) must provide definite and effective limitations concerning the time within which a licensor's decision must be made, and (2) must also provide for prompt judicial review should a license be denied." (Apx. 67a). The district court found that the 150-day limit could be extended by the District Council remanding the application for further proceedings before the Zoning Hearing Examiner, which in the terms of the District Court, "would ratchet back the time limits...." (Apx. 67a). The District Court also found that the zoning ordinance contained no limitation on the number of times an

application could be remanded for continuation of the administrative proceedings, nor a total time by which repeated remands might be limited for a pending application. (Apx. 68a). The court, therefore, concluded there existed the possibility of abusive manipulation of certain of the remand provisions, which could result in "the avenue of unconstitutional abuse". The court nevertheless concluded that there was no evidence that the remand provisions of the zoning ordinance would be used or were intended to be used to circumvent the constitutional requirements that the decision of the licensing authority be within a "specified and reasonable time limit." (Apx. 68a). Thus, like the regulatory scheme in FW/PBS, the remand process allows indefinite postponement of

the issuance of a license and is invalid without further analysis under the holding in FW/PBS. Redner v. Dean, 29 F.3d 1495 (11th Cir. 1994), cert. denied, 115 S.Ct. 1697 (1995)(an adult bookstore ordinance was inadequate under any interpretation of prompt judicial review, because it created a risk that expressive activity could be suppressed indefinitely in the administrative phase prior to a judicial review of a decision to deny a license). Given this record, there is no reason to revisit FW/PBS after such a relatively short period of time; and, none has been offered.

4. THE OPINION IS NOT IN CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS.

The County relies upon TK's Video, Inc. v. Denton County, Texas, 24 F.3d 705 (5th Cir. 1994), as an opinion of another

circuit with which the Opinion in this case conflicts. There, the Fifth Circuit found that the County regulation failed to assure maintenance of the status quo while processing an application for a license by a business existing when the County adopted its regulation. The licensing scheme in question required the County to issue or deny an application within 60 days, and the Court held that the 60 days for acting on a license application imposed no undue burden on the adult bookstore applicant. To the bookstore's objection that the order did not provide prompt judicial review or an automatic stay of an order denying a license, the Court noted that the filing of a notice of appeal to the state court stayed any administrative decision revoking or suspending a license. Id., at 709. The

Fourth Circuit specifically noted and assessed TK's Video. (Apx. 13a, 20a). Further, the County ignores the Fourth Circuit comparison of the Prince George's County 150-day administrative licensing period to those time frames discussed in various District Courts decisions that indicate the necessary inquiry for administrative licensing of adult book stores could be made in a substantially shorter period of time. (Apx. 14a).

Petitioner points to Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993), which construed an ordinance governing the right to obtain a license to build a structure and operate a newsstand on public property. The main opinion of the five judges only noted that it was an open question whether the procedural protection of Freedman was necessary in an ordinance

that regulates the building of newsstands on public property and seven of the judges who wrote to concur or dissent all indicated their disagreement with the mere availability of prompt judicial review to satisfy this court's requirement of prompt judicial review. Id., at 1330-1336, see also Graff v. City of Chicago, 9 F.3d 1309, 1330-1336 (7th Cir. 1993)(In Banc) (Flaum & Cudahy, J.J., concurring)(Ripple, Cudahy & Rovner, J.J., separately concurring)(Cummings, Bauer & Fairchild, dissenting).

Likewise, Jews for Jesus, Inc. v. Mass. Bay Transportation Authority, 984 F.2d 1319 (1st Cir. 1993) was not an adult bookstore case in that it involved assessment of Transit Authority regulations, not a licensing scheme. The persons contacted the authority by

telephone and requested and received permission to engage in non-commercial expressive activity on a first-come-first-served basis; and, if persons were denied authorization in one location, they were permitted to seek to use a different location or to reserve a different time. The court did not hold that access to a court meant proper judicial review. The court found that the authorization requirement was not open to the kind of arbitrary application that this court has determined as inherently inconsistent with a valid time, place and amount of regulation. It held that analysis under Heffron v. Int'l Society for Krishna Consciousness, Inc., 452 U.S. 640 (1991) was the appropriate standard.

5. THE COUNTY MISINTERPRETS THE OPINION OF THE COURT OF APPEALS IN THIS CASE.

The County states that the decision of the Court of Appeals in the instant case is in conflict with the Fourth Circuit's decision in 11126 Baltimore Blvd. v. Prince George's County, Md., ("Warwick I") 886 F.2d, at 1428n.8. This argument, however, is made without reference to this Court's order that vacated the judgment of the Court of Appeals and directed it to reassess its judgment in light of FW/PBS. 11126 Baltimore Boulevard v. Prince George's County, 496 U.S. 901. It overlooks that Warwick I has no precedential value and is null and void on the point in issue in this case. See Black's Law Dictionary (6th ed. 1990), at 1548 ("vacate" defined). Moreover, the Court of Appeals in this

case did not overlook Warwick I. (Apx. 2a-4a).

The Court of Appeals concluded in Warwick I, as the District Court did, that the licensing process was not a prior restraint, even though the County ordinance did not provide any time limits for the decision making process or for an expeditious judicial review. Both courts in Warwick I reasoned that the six months usually taken from the time the application is submitted until the zoning hearing examiner's decision, prior to further administrative action, was not unreasonable. 11126 Baltimore Blvd., 886 F.2d, at 1428n.8; see also 11126 Baltimore Blvd. v. Prince George's County, 684 F.Supp., at 893-897. The Court of Appeals noted that each step of the administrative process was not bound by

precise time limits; 886 F.2d, at 1428n.8; and the District Court found the "County's lack of statutory time constraints [to be] troublesome". See 684 F.Supp., at 899n.31. The reasoning and conclusions of both courts in Warwick I, therefore, are inconsistent with FW/PBS.

The County advances that this Court found the six-month preliminary administrative process reasonable in Warwick I and therefore should have done so in this case. The issue before the Court in this case, given the mandate of this Court, was not the reasonableness of any delay. Rather, the issue and analysis employed by the Court was whether the administrative delay was reasonably brief and subject to prompt judicial review. Utilizing the analysis mandated by FW/PBS and considering the nature and context of

the activity to be licensed, the Court in this case concluded that the administrative delay was not brief and that prompt judicial review was not available. (Apx. 15a, 21a-22a).

CONCLUSION

The Petition for Certiorari should be denied.

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